No. 632

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In the Supreme Court of the United States

October Term, 1955

ELI B. CASTLEMAN, MARION V. CASTLEMAN, LOUIS FEUERMAN, JULIUS NOVEMBER, ELEANOR NOVEMBER, and BERNARD REICH,

Petitioners,

vs.

HOWARD R. HUGHES, RKO RADIO PICTURES, INC., ELI B. CASTLEMAN, MARION V. CASTLEMAN and LOUIS FEUERMAN,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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46 Yale Law Journal (1937), pp. 421, 424-425, McLaughlin, Capacity of Plaintiff-Stockholder to Terminate Stockholders, Suit 11

In the Supreme Court of the United States

October Term, 1955

No. .....

ELI B. CASTLEMAN, MARION V. CASTLEMAN, LOUIS FEUERMAN, JULIUS NOVEMBER, ELEANOR NOVEMBER, and BERNARD REICH,

Petitioners,

vs.

HOWARD R. HUGHES, RKO RADIO PICTURES, INC., ELI B. CASTLEMAN, MARION V. CASTLEMAN and LOUIS FEUERMAN,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners* pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on November 3, 1955.

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*Three of the named petitioners, Eli B. Castleman, Marion V. Castleman and Louis Feuerman, have not authorized the filing of this petition. They are minority stockholders who, it was charged below, consented to a dismissal of the representative stockholder action to the prejudice of other stockholders of the same class. Please see, *infra*, pages 4, 10, 11, 12.

Opinions Below.

The *Per Curiam* Opinion of the Court of Appeals filed November 3, 1955, is unreported and is printed in Appendix A.

The Memorandum (opinion) of the District Court filed August 5, 1954, is unreported and is printed in Appendix B.

Jurisdiction.

The judgment of the Court of Appeals was entered on November 3, 1955, and is printed in Appendix C. Jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented.

1. Whether a Federal court does not radically depart from the accepted course of judicial proceedings in a stockholders' action by refusing to rule on motions, by postponing the case because of, and until after the determination of, a subsequently-filed foreign state action, and finally by dismissing the case for *res judicata* while refusing to hear and determine defenses that the foreign judgment was obtained by collusion in a feigned adversary proceeding.

2. Whether a Federal court may render moot a timely petition to intervene as of right by dismissing the action without ruling on the petition.

3. Whether a sale by a corporation of all of its assets to a defendant officer in a representative stockholder action renders moot the said action against him.

Constitutional Provision and Statutes Involved.

The following provision of the Constitution and the statutes involved are set forth in Appendix D: Constitution, Article IV, Section 1; 28 U. S. C., §1738; Federal Rules of Civil Procedure, Rules 23(b), (c), Rule 24.

Statement.

It is respectfully submitted that this case is of major concern to the integrity of the Federal judicial process.

In December, 1952 the present action was instituted (jurisdiction being founded in diversity under 28 U. S. C., Sec. 1332) in the United States District Court for the Southern District of California. The action was a secondary or representative stockholders' suit in behalf of all stockholders of RKO Pictures, Inc. and RKO Radio Pictures, Inc., principally against Howard R. Hughes* for waste and mismanagement. Damages were estimated at over $38,000,000. [R. 266.]

Eli B. Castleman and Marion V. Castleman and Louis Feuerman, holders of some 2500 shares out of the 4,000,000 shares outstanding, were the nominal plaintiffs; their New York attorneys, Louis Kipnis and Leo B. Mittelman, retained Bernard Reich, a California attorney, to bring the action, and throughout the proceedings below Reich was the only attorney of record for the plaintiffs.

Shortly afterward, the New York attorneys (without Reich's knowledge) reached a private agreement with the defendant Hughes, concerning the settlement of the con-

*This defendant, appellee below and respondent here, filed no brief in the Court of Appeals. There he was "defended" by the nominal plaintiffs supposed to be suing him and the nominal defendant RKO for whose benefit the suit was supposed to have been brought originally. Moreover, Hughes never testified in person in any of the stockholder actions anywhere.

troversy. To consummate their agreement they conspired to obtain a judgment in an ostensibly adversary, collusive action in Nevada. To this end Hughes purported to move to Las Vegas, Nevada, and an action was commenced by New York counsel (without Reich) in the Eighth Judicial District Court of the State of Nevada. [R. 249, 47, 94, 95, 97, 139.]

Because Reich was not a party to the conspiracy and because, as will be seen, when he learned of it he sought to bring the facts before the United States District Court, the parties to the conspiracy tried to dismiss the California action and to discharge Reich from the case. On June 26, 1953, without the knowledge or consent of Reich, the attorney of record for plaintiffs in the California action, the District Court, at the instance of the defendants and plaintiffs' New York counsel, dismissed the California action. [R. 50-55.]

This dismissal of the action, plainly improper, was set aside by the District Court at Reich's insistence on October 5, 1953 [R. 72], but the District Court made its abdicating position clear as early as October 19, 1953, as follows [R. 370]:

> "The Court: May I say just a word? Counsel has done a lot of talking on both sides in this case, but as far as this court is concerned it is going to put this case to sleep until the Nevada case is determined.
>
> "I am not going to hear it and I am not going to do anything with it that I don't have to do.
>
> "This case is pending in Nevada and I understand it is at issue over there. * * * I think as long as they have started through the wringer over there

and that court has jurisdiction of the parties, I am not going to bother with this mess.

"You can fire him [Reich] or not, or he can just sit here and wait. If I don't die of old age first maybe he will."

The District Court below, in accordance with its announced attitude, refused to act. It continued and otherwise refused to act on motions made by Reich in behalf of plaintiffs to set aside the quashing of service of process on Hughes, for the appointment of a Special Master to investigate, and for leave to take the deposition of the defendant Hughes. [R. 118, 121, 122, 173, 181, 205, 207, 317, 351.] Even though the District Court had been apprised of the contention that the Nevada action was collusive and that to protect the interests of the stockholders it was necessary that other stockholders be permitted to intervene, the Court continued and refused to act on the petition to intervene filed by Reich in behalf of Julius and Eleanor November. [R. 205, 207, 317, 351.]

On February 7, 1954, Hughes offered to purchase from RKO "all of its assets as of the date of transfer to (him), including any and all claims or causes of action of every kind or character against, or which might be asserted against, any person or persons including (him)", and moved the Nevada state court for a dismissal on the ground of mootness, in that the anticipated purchase of the assets of RKO, including the stockholder claims against him, would render the claims moot. [R. 200, 243.]

The purchase price was something more than 23 million dollars [R. 219] and some 15 millions less than was involved in damages in the action below. [R. 266.]

Although the notice to the stockholders was limited to the motion to dismiss for mootness because of Hughes'

offer to purchase [R. 200], the Nevada court, on April 1, 1954, after making findings of fact and conclusions of law wholly in favor of Hughes on the merits, dismissed the action as if there had been a trial or in any event a compromise. [R. 222, 255-257.]

The plaintiffs in the Nevada action, being the same parties below, did not oppose Hughes' motion to dismiss and on April 15, 1954, were awarded $160,000.00 for attorneys' fees and costs. [R. 238, 240.]

Prior to the Nevada judgment a Delaware court in *Schiff v. RKO Pictures Corporation,* 104 A. 2d 267 (1954), had refused, at the instance of other stockholders, to enjoin the sale of RKO assets to Hughes.

After the judgment in Nevada, RKO moved the District Court below to dismiss on the ground of *res judicata,* and over the opposition of Reich and the proposed intervenors,* but not of the plaintiffs, and after the Court had refused to permit the action to continue, it granted the motion to dismiss not only on the ground of *res judicata,* but on the further ground that the sale of RKO assets to Hughes rendered the action herein moot. [App. B.]

The posture of the litigation at that stage was as follows: a Delaware court had refused to enjoin the sale to Hughes of RKO's assets; a Nevada state court had made a final determination, purportedly on the merits and in particular on the ground that the sale of RKO's assets

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*Petitioners November herein who had sought to intervene before the District Court as far back as March 11, 1954. Because their petition was never determined the Court of Appeals indicated that they were never parties to the action. [App. A.] They were denied intervention likewise in Nevada. [R. 258.]

had compromised the action; the District Court below had refused to try the issues attacking the Nevada judgment as collusive and fraudulent and had dismissed the action.

No court in any adversary proceeding had examined the charges that the Nevada action was a fraud, which if true constituted a gross imposition on the court below. Accordingly, Reich filed an appeal from the dismissal—without the authority of the nominal plaintiffs,* but with the authority of the proposed intervenors.

Among the errors specified to the Court of Appeals were the following:

> "1. In dismissing the action . . . before hearing and determining the defenses of collusion and the absence of a truly adversary proceeding in Nevada.
>
> "2. In ruling that the final judgment in the Nevada action was *res judicata* and compelled dismissal of the action herein.
>
> "3. In ruling that the Delaware action rendered the action herein moot and compelled its dismissal.
>
> "4. In refusing to try the case, in continuing it indefinitely, putting matters off calendar, refusing to rule on motions, and finally dismissing the case with motions and petitions pending and undetermined.
>
> "5. In failing to grant the timely motion and petition of appellants November to intervene in the action.
>
> "6. In failing to grant timely motions including:
>
> "(a) The whole of plaintiff's motion to vacate order of dismissal made June 26, 1953;

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*Please see *Young v. Higby Company*, 324 U. S. 204, 210-213 (1945), and *Whitten v. Dabney*, 171 Cal. 621, 630-632 (1915).

"(b) Motion to vacate in part Order entered January 12, 1954;

"(c) Motion for appointment of Special Master."

The Court of Appeals' *Per Curiam* Opinion ignored the errors designated 1, 4, 5 and 6, and affirmed. Without citation of authority it ruled that the Nevada action was *res judicata* and the California action below moot. It (foot)noted that the record did not bear out the contention of collusion, and this notwithstanding that there was never a trial of the issue and the record before the Court was almost one-sided in favor of collusion. [R. 45-57, 95-115, 137-172, 245, 249-253.] It (foot)noted, furthermore, that because the Novembers' petition to intervene was not acted upon, the Novembers at no time became parties to the cause.

Reasons for Granting the Writ.

1. The Court of Appeals for the Ninth Circuit has sanctioned a departure by the District Court so far from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision.

It is submitted that the Court of Appeals sanctioned procedures which denied to the stockholders, and to the proposed intervenors, the elementary requisites of due process, to wit, a hearing on the issues of fact presented, and which sanctioned abandonment by the District Court of its judicial functions.

Moreover, the ordinary stockholder being powerless to deal with insiders, and the relationship between management and stockholders not being, by itself, conducive to confidence, it has become increasingly important that there

be *potential* scrutiny by the court in representative stockholder actions, especially in connection with charges of personal aggrandizement at the expense of the company. Enlightened corporate enterprise faces up to this scrutiny. By rule and decision,* a company in such litigation becomes essentially a ward of the court. Proposed settlements particularly require airing before becoming effective. The exercise of judicial examination is vital to the stability of corporate enterprise; and the refusal of a court to act in a given case does general injury.

The courts below have departed from established rules by accepting the determination of another court selected by the defendants and by refusing to examine serious charges concerning the good faith of that litigation. The sport of unseating courts from jurisdiction of such a case, the spectacle of the accused officer "buying" the company's assets, including the lawsuits against him, resemble the crudities of early corporate enterprise. Such practices should not be sanctioned.

A. The Court of Appeals in this case sanctioned the District Court's abdication of its jurisdiction to a state court, contrary to sound judicial procedure.**

McClellan v. Carland, 217 U. S. 268, 281-282 (1910);

Willcox v. Consolidated Gas Co., 212 U. S. 19, 40 (1909);

Bedgisoff v. Cushman, 12 F. 2d 667, 668 (C. C. A. 9, 1926);

In re Howard, 130 F. 2d 534 (C. C. A. 5, 1942);

Schwab v. Coleman, 145 F. 2d 672, 677, 678 (C. C. A. 4, 1944).

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*Cf. *Cohen v. Beneficial Industrial Loan Corp.,* 337 U. S. 541, 547 (1949).

**Corresponds to Questions Presented "1," *supra,* p. 2.

In the *McClellan* case, *supra,* the Supreme Court had before it for review an order below staying an action pending, also a subsequently-filed state action. The Court stated (217 U. S. at pp. 281-282):

> "It cannot be denied that a circuit court of the United States, like other courts, had power to postpone the trial of cases for good reasons, but, by the orders made in this case, the Federal court withheld the further exercise of its authority until the state court, by its action in a case involving all the parties, might render a judgment which would be *res judicata,* and thus prevent further proceedings in the Federal court.
>
> * * * * * * * *
>
> ". . . In the present case, so far as the record before the circuit court of appeals discloses, . . . the Federal court practically turned the case over for determination to the state court. We think it had no authority to do this . . ."

B. The Court of Appeals sanctioned the District Court's renunciation of its duty to ferret out fraud and collusion in representative stockholder actions.*

Federal Rules of Civil Procedure, 23 (c);

Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541, 548, 549 (1949);

Young v. Higby Company, 324 U. S. 204, 210-213 (1945);

Universal Oil Products Company v. Root Refining Company, 328 U. S. 575, 578, 580, 581 (1946);

Certain-Teed Products Corporation v. Topping, 171 F. 2d, 241, 243 (C. A. 2, 1948);

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*Corresponds to Questions Presented "1," *supra,* p. 2.

Cohen v. Young, 127 F. 2d 721, 724, 725 (C. C. A. 6, 1942);

See also:

Winkelman v. General Motors Corporation, 48 Fed. Supp. 490, 493 (D. C. S. D., N. Y., 1942);

Whitten v. Dabney, 171 Cal. 621, 630-632 (1915);

McLaughlin, Capacity of Plaintiff-Stockholder to Terminate Stockholders' Suit, 46 Yale L. J. 421, 424, 425 (1937).

In *Cohen v. Beneficial Industrial Loan Corp., supra,* this Court stated (337 U. S. at p. 549):

> "Likewise, a stockholder who brings suit on a cause of action derived from the corporation assumes a position, not technically as a trustee perhaps, but one of a fiduciary character. He sues, not for himself alone, but as representative of a class comprising all who are similarly situated. . . . He is a self-chosen representative and a volunteer champion. The Federal Constitution does not oblige the State to place its litigating and adjudicating processes at the disposal of such a representative, at least without imposing standards of responsibility, liability and accountability which it considers will protect the interests he elects himself to represent. It is not without significance that this Court has found it necessary long ago in the Equity Rules and now in the Federal Rules of Civil Procedure to impose procedural regulations of the class action not applicable to any other."

In *Winkelman v. General Motors Corporation, supra,* the District Court stated (48 Fed. Supp. at p. 493):

> "The purpose of the notice required by the Rule is stated by Judge Allen in Cohen v. Young, 6 Cir.,

127 F. 2d 721, at page 725, as follows: '* * * the rule was adopted to secure not routine approval of a consent decree, but in order to insure supervision of the court for the protection of the corporation and all the stockholders. Cf. McLaughlin, op. cit., supra.'

* * * * * * * *

"'The role of the court is to see that the compromise is fair and reasonable under the circumstances and that no collusion or fraud has been practiced in the consummation of the settlement.'"

In *Whitten v. Dabney, supra,* the California Supreme Court on a motion to dismiss the appeals on the ground of a compromise of a representative stockholder suit stated (171 Cal. at p. 630):

"* * * [T]hese plaintiffs have no personal wrongs for which they are entitled to seek redress in this action. * * * He is permitted to sue in this manner *simply in order to set in motion the judicial machinery of the court.* * * * And yet we find in this agreement the plaintiffs declaring that there has been a complete settlement and adjustment 'of all claims of the plaintiffs against Miley and Dabney as set forth in plaintiffs' complaint.' What is the exact situation of a plaintiff in such an action? He is a trustee pure and simple, seeking in the name of another a recovery for wrongs that have been committed against that other.

* * * * * * * *

". . . Not only should a plaintiff in such a fiduciary capacity be willing to take no act that did not first receive the sanction of the court of equity to which he has appealed, but, more than this, he is not permitted to take any act without such sanction."

Yet, it would appear to be the sense of the opinions below that the nominal plaintiffs had as complete control of this representative litigation as if they were dealing with their own property.

C. The Court of Appeals in this case sanctioned the District Court's refusal to hear the attack made before it on the Nevada judgment for fraud, collusion, and the absence of an adversary proceeding.*

United States v. Throckmorton, 98 U. S. 61, 65-66 (1878);

Earl of Bandon v. Becher, 3 Clark & F. 479-512 (6 Eng. Rep. 1517) (1835);

Duchess of Kingston's Case, 20 Howell State Trials 355, 478, 479 (1776).

In *United States v. Throckmorton, supra,* the Court stated (98 U. S. at pp. 65-66):

> "But there is an admitted exception to this general rule, in cases where, by reason of some thing done by the successful party to a suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case . . . or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases *which show that there has never been a real contest in the trial or hearing of the case,* are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and upon the case for a new and a fair hearing." (Emphasis added.)

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*Corresponds to Questions Presented "1," *supra,* p. 2.

In the *Earl of Bandon* case, the English court quoted from the *Duchess of Kingston* case as follows (6 Eng. Rep. at p. 1529):

> "A sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled—in order to make a sentence there must be a real interest, a real argument, a real prosecution, a real defense, a real decision. Of all these requisites not one takes place in the case of a fraudulent and collusive suit; there is no judge, but a person invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question. . . ."

On its own the English court case stated:

> "It is not an irregularity, it is not an error which is here complained of, but it is that the whole proceeding is collusive and fraudulent; and it cannot therefore be treated as a judicial proceeding, but may be passed by as availing nothing to the party who sets it up."

It appears to be the sense of the Memorandum in the District Court and the *Per Curiam* Opinion in the Court of Appeals that the plaintiff-shareholders exclusively controlled the action and that it was not the duty of the District Court, or of the Court of Appeals, or of counsel to unearth and expose a fraud. The courts below, contrary to what this Court said in *Universal Oil Products Company v. Root Refining Company,* 328 U. S. 575, 578, 580, 581 (1946), did not feel it encumbent on the trial court to hold a hearing on the question as to whether fraud had been practiced upon it or whether "the very temple of justice had been defiled."

2. The Court of Appeals, in sanctioning the District Court's abdication of its jurisdiction to a state court, has decided an important federal question in a way in conflict with applicable decisions of this Court and with other Courts of Appeal on the same matter.*

****McClelland v. Carland*, 217 U. S. 268, 281-282 (1910);

Willcox v. Consolidated Gas Co., 212 U. S. 19, 40 (1909);

Western Union v. United States & M. T. Co., 221 Fed. 545, 550 (C. C. A. 8, 1915).

Please see citations under 1 A, *supra.*

In *Willcox v. Consolidated Gas Co., supra,* this Court stated:

> ". . . When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (Cohen v. Virginia, 6 Wheat. 264, 404, 5 L. ed. 257, 291). * * * The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."

In *Western Union v. United States & M. T. Co., supra,* the Eighth Circuit Court (221 Fed. at p. 550) stated:

> ". . . *the averments of the cause of action invoked the undoubted power and duty of that court to hear and determine the issues* tendered thereby on their merits, a power and duty which it might not lawfully renounce or avoid; for 'the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them in every case to which their jurisdiction extends. *They cannot abdicate their authority or duty in any case in favor of another jurisdiction.*'" (Emphasis added.)

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*Corresponds to Questions Presented "1," *supra*, p. 2.

**Please see, *supra*, p. 10.

3. The Court of Appeals, in sanctioning the District Court's application of Full Faith and Credit and *res judicata* to a collusive (so alleged but untried) judgment, has decided an important federal question in a way in conflict with applicable decisions of this Court.*

United States v. Throckmorton, 98 U. S. 61, 65-66 (1878);

Hansberry v. Lee, 311 U. S. 32, 40, 45 (1940).

Please see citations under 1 A, *supra.*

Please see also Note, *Binding Effect of Class Actions,* 67 Harv. L. Rev. 1059-1060 (1954), in which it was stated:

> "It should be noted that the binding force of a particular action cannot be determined accurately by the court which hears the class suit, for that court is ill-equipped to test the adequacy of the representation of absent class members, the sufficiency of notice given, or even the general fairness of the proceeding. Since these questions can best be answered realistically with respect to a particular person, the ultimate effect of the class action judgment will be determined when it is introduced in a subsequent action to bind persons not parties to the original action.
>
> "*Adequate Representation* — The class action is premised on the theory that members of the class who are not before the court can justly be bound because the self-interest of their representatives will assure adequate litigation of the common issues. Where, however, the interests of absent class members have not been adequately represented, binding them by class judgment would seem to offend the

*Corresponds to Questions Presented "1," *supra,* p. 2.

requirements of due process. [Hansberry v. Lee, 311 U. S. 32, 40 (1940).] Thus, the class action in which the class representatives colluded with the common adversary can have no effect upon those who did not participate."

4. The Court of Appeals, in ruling that the District Court's inaction on the petition of the Novembers to intervene as of right gave them no rights as parties, has decided an important federal question in a way in conflict with applicable decisions of this Court and with other Courts of Appeal on the same matter.*

Cf. Allen Calculators, Inc. v. National Cash Register, 322 U. S. 137 (1944);

Wolpe v. Poretsky, 144 F. 2d 505, 508 (C. A. Dist. of Col., 1944), cert. den. 323 U. S. 777 (1944);

Cohen v. Young, 127 F. 2d 721, 724 (C. C. A. 6, 1942);

Western Union v. United States & M. T. Co., 221 Fed. 545, 552 (C. C. A. 8, 1915).

In *Wolpe v. Poretsky, supra,* the court held that intervention could be had even after a final decree. It stated (144 F. 2d at p. 508):

"The application to intervene was timely. Intervention may be allowed after a final decree where it is necessary to preserve some right which cannot otherwise be protected. Here at least one of the rights which cannot be protected without intervention is the right of appeal. The court was, therefore, in error in denying appellants leave to intervene as a matter of right.

"In their motion to intervene appellants relied solely on Rule 24(b) of the Federal Rules of Civil

*Corresponds to Questions Presented "2," *supra,* p. 2.

procedure, which relates to permissive intervention. However, had the intervention been permissive we think it would have been an abuse of discretion to deny it under the circumstances of this case. * * *

"When they filed their petition for intervention appellants had all the rights of a party at that stage of the proceedings. This, of course, includes the right of appeal. Since the time for appeal had not expired when appellants sought to intervene they should be made parties with the right to appeal and all other rights a party might exercise at the time their intervention was filed." (Emphasis added.)

The District Court refused to hear and determine the petition of appellants November to intervene in the action. Contrary to the above cited cases, the Court of Appeals (foot)noted that because the District Court failed to act on the petition to intervene, the Novembers never became "parties to the cause."

5. The Court of Appeals, in deciding that the purchase by defendant Hughes of all of the assets of RKO rendered the secondary shareholder action moot, has decided an important question of federal law which has not been, but should be, decided by this Court.*

The question is one of law: may an officer and stockholder sued for fraud and mismanagement by other stockholders defeat jurisdiction of an action against him by buying up all of the assets from the corporation purportedly including stockholder derivative causes of action.**

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*Corresponds to Questions Presented "3," *supra*, p. 2.

**For the facts, please see *Schiff v. RKO Pictures Corp.* (Del.), 104 A. 2d 267, which refused to enjoin the sale to Hughes and to which the Court of Appeals refers. [R. 392].

Only one case, to wit, *Webster Eisenlohr, Inc. v. Kalodner*, 145 Fed. 316 (C. C. A. 3, 1944), cert. den., 325 U. S. 867 (1945), was cited by respondents to the courts below. There a preferred stockholder brought a minority action to protect the voting rights of all preferred stockholders. During the course of the proceedings the corporation offered to buy up the preferred shares. Plaintiff accepted the offer and his attorney, after being compensated, announced to the court that he had no client. The trial court, suspicious of the circumstances, appointed a Special Master. On appeal the appointment was vacated, but Circuit Judge Biggs, in the course of his dissenting opinion, stated that if all of the preferred stock had been purchased or obtained (it had not), the case was compromised and was ripe for dismissal—not moot, for "no matter by what course the suit proceeds or is dismissed, the approval of the District Court is necessary." (145 F. 2d at p. 326.)*

Except for this case, petitioners have not been able to find any case in point on this issue of alleged mootness; nor, for that matter, have petitioners been able to find a case which holds that a stockholder derivative action is even assignable or saleable to anyone, particularly to the executive accused.

The holding below that the sale of all assets of a corporation to the accused officer renders a secondary stockholder suit moot and therefore a F. R. C. P. 23(c) hearing in that suit unnecessary, constitutes, it is respectfully submitted, an important innovation warranting review by this Court.

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*Especially herein, since in the case of the sale of assets consent of individual stockholders is not required.

Conclusion.

These facts in the instant case excite scrutiny:

1. The steadfast inaction by the District Court in favor of a suit filed afterward in a selected foreign state jurisdiction;

2. The refusal of the court to entertain issues or otherwise to try charges that the Nevada judgment, asserted by defendants as a bar, was in fact collusive and an imposition on the courts;

3. The refusal of the courts below to recognize the absolute right of intervention in a representative stockholders' action, particularly where collusion is charged.

4. The disposition of the stockholders' action on the basis of purchase by the person charged with the wrongdoing.

All of these were sanctioned by the Court of Appeals for the Ninth Circuit. Of these, the refusal of the District Court to hear or to determine issues, particularly in a stockholders' action, and affirmance by the Court of Appeals, appear most grave.

The supervisory function by the Supreme Court of the judicial system of the United States is recognized in its Rule 19(1)(b). Petitioner respectfully urges that this is a case which calls for that supervisory power.

Respectfully submitted,

January, 1956.

JACK P. BLUME,
Attorney for Petitioners.

BERNARD REICH and
MORRIS E. COHN,
Of Counsel.

APPENDIX A.

United States Court of Appeals for the Ninth Circuit.

Eli B. Castleman, Marion V. Castleman, Louis Feuerman, Julius November, Eleanor November, and Bernard Reich, Appellants, vs. Howard R. Hughes, RKO Pictures Corporation, RKO Radio Pictures, Inc., The Chase National Bank of the City of New York, Eli B. Castleman, Marion V. Castleman and Louis Feuerman, Appellees. No. 14,573. Nov. 3, 1955.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Healy and Fee, Circuit Judges, and Walsh, District Judge.

Per Curiam

This is an appeal from a judgment of dismissal and from an order denying motions of appellant Bernard Reich, Esq., that the court determine and enter judgments in his favor for attorney's fees and costs as against certain of the parties.

The suit is, or was, one of several shareholders' derivative suits brought in both state and federal courts throughout the United States alleging damage to RKO Pictures Corporation through asserted mismanagement on the part of its corporate officers, mainly Howard R. Hughes. For an account of the events giving rise to the litigation consult Schiff v. RKO Pictures Corp. (Del.), 104 Atlantic 2d 267. The validity of a sale to Hughes of all the assets of that corporation, including all causes of action held by it against any person, including Hughes, had prior to the decision below been upheld by the Delaware Chancery Court in the above cited case, rendering the present action moot. Also prior to the decision a suit involving the same issues here presented had gone to judgment in a Nevada state court. The court below held, and we agree,

APPENDIX A.

United States Court of Appeals for the Ninth Circuit.

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that the Nevada judgment is to be given the effect of *res judicata*.[1] There was no error in dismissing the suit.

What remains to be considered is the contention of Reich that the court erred in denying his motions to award him attorney's fees and costs for services in the suit. Reich had been employed by Louis Kipnis, a New York attorney, to file a "standby" suit in the Southern District of California on behalf of Eli and Marion Castleman as shareholders of RKO. The Castlemans were clients of Kipnis. Some eight days after the institution of this suit the Castlemans, through Kipnis as their counsel, brought the above-mentioned suit in the Nevada state court. Some months later on Kipnis discharged Reich, or tried to.[2] In the Nevada action Kipnis was recipient of an award of attorney's fees for services on behalf of the Castlemans as RKO shareholders. The Nevada court ruled that no counsel representing the Castlemans in actions elsewhere were to be entitled to any fee other than that allowed by it.

In this posture of affairs we see no error or abuse of discretion in the court's relegating Reich to his remedy against his employer Kipnis—a remedy now admittedly being pursued by Reich in the New York courts.

Affirmed.

(Endorsed:) *Per Curiam* Opinion. Filed Nov. 3, 1955.
Paul P. O'Brien, Clerk.

---

[1]Reich argues that the Nevada action was collusive, but the record does not bear out his contention.

[2]Reich appears to have acquired two clients of his own, namely, Julius November and Eleanor November, whose names appear as appellants in the caption on this appeal. Through Reich the Novembers, asserting that they were stockholders in RKO, moved for leave to intervene in the suit below. Their motion was not acted upon but was taken under consideration along with the motion to dismiss the suit. As already appears, the motion to dismiss was granted, so that the Novembers at no time became parties to the cause.

APPENDIX B.

MEMORANDUM GRANTING MOTION TO DISMISS.

This case is one of several shareholders' derivative actions filed in both state and federal courts throughout the United States involving alleged injury to the same corporation at the hands of the same corporate officers. [For a detailed history of the events giving rise to this litigation see Schiff v. R.K.O. Pictures Corp., 104 A. 2d 267 (1954).]

Defendant R.K.O. Radio Pictures, Inc., has made a motion to dismiss this action with prejudice. The occurrence of two events since the institution of this action compels that this motion be granted.

First, a sale of all of the assets of the corporation on behalf of which this action was brought to the corporate officer who is the alleged principal wrongdoer has been consummated. The terms of the contract of that [804] sale provide that all causes of action held by the corporation against any person including that particular officer are to be a part of the assets sold. The validity of this sale has been upheld by the Delaware Chancery Court. [Schiff v. R.K.O., *supra.*] The effect of that sale is to render this action moot.

Second, that action involving the same issues which are or would be present here instituted in a Nevada state court has gone to judgment on all of these issues. That judgment must be given the effect of ***res judicata*** by this court.

The motion of local counsel, Bernard Reich, for attorney's fees and costs must be denied. Local counsel was employed to bring this action by New York counsel for plaintiff-shareholders Castleman. Employing counsel has

been the recipient of an award of attorney's fees made in the Nevada action heretofore referred to. Local counsel must look to his employer and not to this court for his fee. Even if this were not the case this court could not make an award of fees to local counsel because the Nevada court has held that no counsel representing plaintiffs Castleman in actions pending elsewhere is entitled to any fee other than that allowed by it.

Dated: This 5th day of August, 1954.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed August 5, 1954 [805].

APPENDIX C.

United States Court of Appeals for the Ninth Circuit.

Eli B. Castleman, *et al.*, Appellants, vs. Howard R. Hughes, R K O Pictures Corporation, *et al.*, Appellees.

No. 14,573.

JUDGMENT.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment

Filed and Entered: November 3, 1955

PAUL P. O'BRIEN, Clerk.

APPENDIX D.

CONSTITUTION

Article IV.

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

RULE 23. CLASS ACTIONS.

(b) *Secondary Action by Shareholders.* In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

(c) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

RULE 24. INTERVENTION.

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof. As amended Dec. 27, 1946, effective March 19, 1948.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. As amended Dec. 27, 1946, effective March 19, 1948.

(c) *Procedure.* A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., §2403.

Office - Supreme Court, U. S.
FILED
FEB 18 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 632

ELI B. CASTLEMAN, MARION V. CASTLEMAN LOUIS FEUERMAN, JULIUS NOVEMBER, ELEANOR NOVEMBER AND BERNARD REICH,

Petitioners,

against

HOWARD R. HUGHES, RKO PICTURES INC., ELI B. CASTLEMAN, MARION V. CASTLEMAN and LOUIS FEUERMAN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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New York, N. Y.,
Attorney for Respondents, Eli B. Castleman, Marion V. Castleman and Louis Feuerman (also listed in the title herein as "Petitioners").

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Corrective Statement

By reason of dissatisfaction with the presentation of the "Statement" by the "Petitioners", these respondents* make the following Corrective Statement to rectify inaccuracies and supply omissions.

These respondents submit that an advocate's partisan zeal is no license to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading.

* Eli B. Castleman, Marion V. Castleman and Louis Feuerman, who are also named, in the caption, as "Petitioners".

Preliminarily, it will be observed that the "Petitioners'" statement is composed largely of unwarranted conclusions and impermissible inferences rather than of facts of record.

• • •

The action, in the United States District Court for the Southern District of California, was but one of four *identical* minority stockholder actions for an accounting (R. 25) by the *same* plaintiffs (R. 97) against the directors of RKO, in separate jurisdictions (R. 319).

The estimate of 38 million dollars as damages to RKO is hearsay based on hearsay, without any foundation in fact. The Record reference at R. 266 is solely to Mr. Bernard Reich's unsupported "idea".

Without record-reference Mr. Reich claims that "throughout the proceedings below" he was the only attorney of record (Pet. 3). That is contrary to fact. The Record at p. 121 shows that Louis Kipnis was admitted in the District Court *pro hac vice* at least 10 months before the entry of the judgment dismissing the action. Moreover, from the date of the filing of the complaint Kipnis' name appeared as plaintiffs' counsel (R. 26) of record.

• • •

The paragraph beginning at the bottom of page "3" of the Petition consists of three sentences. No record citation is given to support either the first or the second sentence of said paragraph, nor can there be any. Actually, the record is to the contrary (R. 223 and 225). Please also see Appendix A and B of the Petition. Moreover, the references that appear at the conclusion of said paragraph do not relate to the two prior sentences. As to the final sentence, the references are to inferences bottomed on the pseudo-logical proposition of *post hoc ergo propter hoc.*

There never was any conspiracy of any kind or nature and the record is clear on it (R. 225).

Mr. Reich and all parties in the Nevada action were given notice and opportunity to be heard "with respect to certain charges made by one Bernard Reich" as to conspiracy and collusion (R. 117). Indeed, the fact of Mr. Reich's "charges" asking the Nevada Court to appoint a special master was contained in the proxy statement, which "was duly mailed to all stockholders of RKO" (R. 189) on or about March 1, 1954. Mr. Reich avoided and evaded testifying at the scheduled hearing in open Court (R. 117) as to his "charges" by hospitalizing himself (R. 334).

* * *

The statement as to the conduct of the District Court (Pet. 5) is, by reason of the omission of record-facts dealing with the concurrence therein by Mr. Reich, untrue and misleading. The District Court had the action under its constant supervision involving at least 20 contacts therewith (R. Index iii, iv). The inference of "abdication" on the part of the District Court, which this Court is asked to draw, is utterly impermissible in the light of any one of these statements by Petitioner Reich:

For example:

> "I say only at this time that this action should not be dismissed and that this Court should retain jurisdiction pending the outcome of the state action in Nevada" (R. 55).
>
> "The undersigned does not insist that this Court try the case" (R. 85).
>
> "I told Judge Harrison that I wanted the California action to be a stand-by action * * *" (R. 142).
>
> "* * * I was willing to let Mr. Hughes' motion to quash to go by default on condition that the mo-

> tion for security be opposed and that the California action * * * would remain as a stand-by action * * *" (R. 169).

Finally, when the District Court took the responsibility for continuing the motions until after the Nevada case was disposed of, Mr. Reich said:

> "Very well, your Honor, I accept the ruling" (R. 247).

In the face of the actual record it ill-becomes Mr. Reich to accuse the District Court of "abdication".

* * *

Next, the reference as to the proposed intervention by Julius and Eleanor November (Pet. 5) in the California action fails to disclose to this Court that the Final Order in the Nevada action showed that these same persons had appeared therein (R. 237, 189) and had some months before sought (unsuccessfully) to intervene in the Nevada action (R. 337). Moreover, their motion for intervention was filed on March 11, 1954 (R. 175), in the District Court one month *after* Mr. Hughes had made his offer (February 7th, 1954) (R. 219) to purchase the assets of RKO Pictures Corp., which offer received nationwide press and radio coverage. These facts were, however, before the District Court (R. 189).

* * *

Next, at the top of page 6 of the Petition reference is made to the Findings of Fact and Conclusions of Law of the Nevada court which are said to be "wholly in favor of Hughes on the merits". Mr. Reich prepared the record for the Court of Appeals but saw fit to cut out vast portions of the Findings and Conclusions (R. 384). The printed record-references are to Mr. Reich's own inferences and conclusions. The complete record speaks for

itself. Mr. Reich's own statements in the Petition and in the printed "Record" are contrary to fact. The complete Findings, unedited by petitioner Reich, revealed many areas of triable issues of fact which were finally settled and compromised in the Nevada action (R. 223). Those facts were before the District Court (R. 185).

• • •

"Petitioners" refer to the Delaware judgment citing it as *Schiff* v. *RKO Pictures Corporation*, 104 A. 2d 267 (1954) (Pet. "6"). Notice of the pendency of said action was contained in a proxy statement, cleared by the United States Securities & Exchange Commission, which went to the 15,000 shareholders of RKO Pictures Corporation (R. 189), including the "Petitioners", all pursuant to Court order. That fact was before the District Court (R. 193, 189).

• • •

Tangential reference to counsel fees on page "6" of the Petition points up the omission by Mr. Reich of any mention of the fact that what was involved below were nothing more than varying aspects of his pursuit of legal fees. Even on a statistical basis the record before the Courts below and here, is devoted 26% (105 pages out of 389) to the subject of lawyers' fees. The District Court recognized the nature of Mr. Reich's activities below before he ever filed his formal applications for fees (R. 373, 367).

The judgment of the District Court (R. 360) is comprised of three segments, two of which have to do with Mr. Reich's fee applications, which were denied. That was the judgment appealed from (R. 362). The Court of Appeals decision (Appendix A, Pet.) clearly illuminated the proclivities of Mr. Reich in the litigation herein.

The "errors" specified at page "7" of the Petition running in quotation marks from "1" through "6c" do not appear in the record before this Court. They have

been extracted from the brief submitted by Mr. Reich to the Court of Appeals. In this reproduced, but partial, extract supplied by Mr. Reich, he caused to be eliminated item No. "8", also dealing with fees, which reads as follows:

> "8. In denying the motions (2) for counsel fees and costs as against the defendant (other than the bank) and as against the plaintiffs".

The deliberate omission of "error" No. "8" does not change the fact, nor the Record, that primarily what the District Court was occupied with in the multitude of motions made before it was the award of fees to Mr. Reich. The District Court was all too correct, it must be sadly conceded, when it stated during one of the twenty times that the action was before it:

> "It is a spectacle to find lawyers fighting among themselves. It does not bring credit upon anybody" (R. 373).

Please also see R. 367, 370 and 371.

* * *

Without record reference Mr. Reich states (Pet. 7) that no court in any adversary proceeding examined his "charges" that "the Nevada action was a fraud" (whatever that may mean). (Parenthetically, the very action which Mr. Reich now calls "a fraud" is the one in which he sought to be named as co-counsel (R. 323).) The fact is that the Nevada court examined the "charges" (R. 223-225). The District Court of necessity must have reviewed them and the Court of Appeals stated (footnote 1, Appendix "A", of the Petition) "Reich argues that the Nevada action was collusive but the record does not bear out his contention."

In the light of the supplied omissions and of the corrections, the "questions presented" stand revealed as synthetic froth.

There is neither substance nor merit to the Petition.

Reasons for Denying the Petition

"It would be time-saving if we had a descriptive catalogue of recurrent types of fallacies encountered in arguments addressed to the courts, giving each of them a number, so that, in a particular case, we could say, 'This is an instance of Fallacy No.—'. Such a device would be helpful here. For the fallacy of the appellee's argument is of a familiar kind: In formulating the reasons for their decisions, judges often adopt rulings made in previous decisions in which the facts were somewhat similar, saying, in effect, 'This situation is sufficiently like those which we previously considered so that we can disregard the differences and restrict ourselves to the resemblances'. And, thus ignoring—for the purpose immediately at hand—the unlikenesses, the situations are frequently spoken of as identical. But elliptical discussions of cases partly alike, as if there were complete identity, is merely for convenience. There is present, although it may be unexpressed, an 'as if', a 'let's pretend'—a simile or metaphor. Such 'as-if' or metaphorical thinking is invaluable in all provinces of thought (not excepting that of science). However, some of the greatest errors in thinking have arisen from the mechanical, unreflective, application of old formulations—forgetful of a tacit 'as-if'—to new situations which are sufficiently discrepant from the old so that the emphasis on the likenesses is misleading and the neglect of the differences leads to unfortunate or foolish consequences" (*United Shipyards, Inc.* v. *Hoey,* 131 F. 2d 525, 526; 2 Cir. (1942).

So here, do we have mechanical, unreflective application of old formulations—forgetful of a tacit "as-if". "And, thus ignoring—the unlikenesses":

We find the wise exercise of judicial discretion by the District Court treated by Mr. Reich "*as if*" it were "abdication".

We find a dismissal, with prejudice, on a speaking motion treated "*as if*" it were a voluntary termination of a class suit.

We find a motion for intervention spoken of "*as if*" Rule 24 F. R. C. P. is a self-executing one.

We find the fallacious doctrine of *post hoc ergo propter hoc* treated "*as if*" the time sequence of events implied a causal relation between them.

And we find "charges" treated "*as if*" they were proven facts.

The Nevada Judgment.

Two basic misconceptions underlie "petitioners" attempt collaterally to attack the Nevada judgment. (The Castlemans' and the Novembers are without standing to make the attack; the former, as *the* parties in the Nevada action, and the latter, as shareholders of RKO to whom notice and opportunity to be heard had been given and who, by their own attorneys, were in Court (189). This leaves, solely, Mr. Reich, but he is not a shareholder of RKO).

The first conceptual error is as to the nature of Rule 23 of the Federal Rules of Civil Procedure. If, contrary to interpretation, it be insisted that a dismissal, with prejudice, on a speaking motion, is a voluntary termination prohibited by the Rule, then no secondary class action

may ever be defeated by motion for summary judgment or other motion addressed to the Court. But, as *Winkelman* v. *General Motors Corporation,* 48 F. Supp. 490 (D. C. S. D. N. Y.) (1942), instructs us:

> "* * *, the rule was adopted to secure not routine approval of a consent decree, but in order to insure supervision of the court for the protection of the corporation and all the stockholders. Cf. McLaughlin, op. cit. supra."

This is precisely what took place in Nevada (R. 223-225).

The second conceptual error is that a shareholder, or member of a class, is illimitably free, after notice by Court order, to shun an opportunity to be heard and refrain from presenting evidence of "collusion" in a particular court, not take an appeal therein and later reactivate these "charges" in another court, at another time. Such an attack was attempted in *Stella, etc.* v. *Kaiser, et al.,* 218 F .2d 64, 2 Cir. (1954), but the Court held there that an out-of-state judgment was entitled to the effect of *res judicata* and not subject to collateral attack.

The attempt here collaterally to attack the Nevada judgment was properly denied by the District Court and Court of Appeals.

* * *

The District Court and the Court of Appeals were cognizant of the holding in *Mann* v. *Superior Court of Los Angeles County,* 127 P. 2d 970, 975, where it was written:

> "A representative suit such as a stockholder's derivative suit, involving as it often does the possibility of large financial returns, is not an open sesame for fees to counsel for interveners."

Does Mr. Reich seriously mean that no discretion is to be allowed to a District Court in intervention applications? Is this something for this Court to waste its time on?

The Delaware Judgment.

On the matter of "mootness" by reason of the Delaware judgment on the R.K.O. sale of assets, we know that it makes no difference how a court learns of the mootness of an action (*Puget Sound Power & Light Co.* v. *City of Seattle,* 271 Fed. 958; 9 Cir. (1921)).

The District Court, here, learned of it first hand, by motion with supporting documents (R. 184-185). And it followed the Delaware interpretation of a Delaware statute concerning a Delaware Corporation by the Delaware Court (Pet., Appendix B).

The Chancellor of Delaware viewed the action of *Schiff* v. *RKO Pictures* thus:

> "This is a proposed sale of assets under 8 Del. C. Sec. 271" (*Schiff* v. *RKO Pictures Corporation,* 104 A. 2d 267 at 270).

The decision of the Chancellor was, therefore, a decision by a Delaware Court relative to a Delaware statute tried in a Delaware tribunal. Moreover, RKO Pictures Corporation was a creature of the State of Delaware. Its charter rights and powers were being examined.

When the Delaware judgment came before it, the District Court accorded to it the full faith and credit to which it is entitled, and the Court of Appeals affirmed the District Court (Appendix to Pet. A, B).

Thus spoke the Chancellor of Delaware, in the *Schiff* case, *supra,* on the subject of "Bad Faith" (at p. 280 of 104 A. 2):

> "Finally, plaintiffs charge that the proposed sale of assets is tainted with bad faith. Plaintiffs' claim of fraud or bad faith is at best an invitation to reconsider as a whole the various individual charges just reviewed. Conceding that Hughes, by his offer, will by-pass the impending derivative waste actions against him, that consequence does not condemn the transaction. It is not uncommon for corporate executives to attempt to clean the litigation slate in one fell swoop in order to be done with it."

Could the District Court and Court of Appeals refuse to credit fully the Delaware judgment on a matter of Delaware law arising under a Delaware statute?

This Court in *Albertson* v. *Millard,* 345 U. S. 242, 97 L. ed. 983 at 985, said:

> "Interpretation of state legislation is primarily the function of state authorities, judicial and administrative. The construction given to a state statute by the state courts is binding upon federal courts."

And that is how the District Court and the Court of Appeals treated the matter.

* * *

This Petition is an attempt to transform a lawyers' fee squabble into a case "of major concern to the integrity of the Federal judicial process." The following is what the District Court had, in part, before it while Mr. Reich was loftily talking about the integrity of the federal judicial process:

Said Mr. Reich in his fee application (R. 285):

> "9. Should, however, this Court be inclined to dismiss this action, then I respectfully request it to act on the motion herein for counsel fees and costs as did the Court in Las Vegas, Nevada * * *".

and he concluded thus:

> "Wherefore I respectfully pray that if this Court dismisses the action, it should fix and determine my counsel fees and costs and condition any dismissal on payment of them to me by the defendants."

This respectful prayer followed a lengthy and lurid farrago of "offenses" for which there was stated to be neither balm nor a monetary equivalent of balm for petitioner Reich.

No great acumen was needed either in the District Court or Court of Appeals to appraise, in this context, Mr. Reich's protestations concerning integrity; nor, it is respectfully submitted, is any needed here.

* * *

Finally, we have the matter of the District Court's control over its own docket here denominated "error".

The putting "off-calendar" of the motions of the parties (not only those of Mr. Reich) was unquestionably a discretionary matter. As the late Mr. Justice Cardozo wrote in *Landis* v. *North American Company*, 299 U. S. 248, 81 L. ed. 153 (1936), at page 158:

> "Viewing the problem as one of power, and of power only, we find ourselves unable to assent to the suggestion that before proceedings in one suit may be stayed to abide the proceedings in another, the parties to be two causes must be shown to be the same and the issues identical * * * (citing cases). Apart, however, from any concession, the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants. How this

can be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance * * *. Occasions may arise when it would be a 'scandal to the administration of justice' in the phrase of Jessel, M. R. (Amos v. Chadwick, L. R. 9 Ch. Div. 459, 462), if power to coordinate the business of the court efficiently and sensibly were lacking altogether."

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Dated: February 1956.

Respectfully submitted,

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No. 632

FEB 20 1956

HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

ELI B. CASTLEMAN, MARION V. CASTLEMAN, LOUIS FEUERMAN, JULIUS NOVEMBER, ELEANOR NOVEMBER, and BERNARD REICH,

Petitioners,

vs.

HOWARD R. HUGHES, RKO RADIO PICTURES, INC., ELI B. CASTLEMAN, MARION V. CASTLEMAN and LOUIS FEUERMAN,

Respondents.

BRIEF OF RKO RADIO PICTURES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 632

ELI B. CASTLEMAN, MARION V. CASTLEMAN, LOUIS FEUERMAN, JULIUS NOVEMBER, ELEANOR NOVEMBER, and BERNARD REICH,

Petitioners,

vs.

HOWARD R. HUGHES, RKO RADIO PICTURES, INC., ELI B. CASTLEMAN, MARION V. CASTLEMAN and LOUIS FEUERMAN,

Respondents.

BRIEF OF RKO RADIO PICTURES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of Case

Petitioners' statement necessitates a statement correcting inaccuracies and supplying omissions. The actual facts are beyond reasonable controversy:

1. Parties and Judgments Below.

This cause originated as a stockholders' derivative action in the Southern District of California by *Eli B. Castleman and Marion V. Castleman, doing business as*

Wolverine Textile Company, and Louis Feuerman (herein collectively referred to as "the Castlemans"), Plaintiffs, against *Howard R. Hughes* (herein "Hughes"), *RKO Pictures Corporation* (herein "RKO"), *RKO Radio Pictures, Inc.* (herein "Radio"), and *The Chase National Bank of the City of New York* (herein "Chase"), Defendants.

The final judgment of the district court (a) dismissed the cause with prejudice and (b) denied two applications of Bernard Reich, Esq., (herein "Reich") for counsel fees and costs, one directed against his former clients, the Castlemans, and one directed against Radio (R. 360).

The Court of Appeals, per curiam, unanimously affirmed (Petition, Appendix A).

2. "Parties" to Petition.

Five stockholders of RKO are named as "Petitioners." Three—the Castleman group—are so designated without authority (conceded, Petition, p. 1, footnote), and are named also as Respondents.[1] The other two stockholders—the Novembers—were not parties below. Sixteen months after institution of the California action, and four weeks before the motion to dismiss such action, they sought leave to intervene (see p. 9, below). The sixth "petitioner," Reich, was not a party.

Radio is the only actual Respondent. Jurisdiction was never obtained over RKO, Chase, or Hughes.

Radio's presence in the case is anomalous: at the inception of this litigation Radio was a wholly owned subsidiary of RKO; no plaintiff or attempted intervenor owned stock in Radio, and of course no relief was or can be sought

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[1] Since it is a contradiction for the Castlemans to appear on both sides of the docket, since it is undisputed that they discharged Reich months before the final judgment (R. 63), and since Reich concedes that they have not authorized this "petition," they have at best only a tenuous connection with this proceeding.

for or against it. In July, 1955, all the issued and outstanding capital stock of Radio was sold to General Teleradio, Inc., which is not now and never has been a party.[2]

Yet Radio has now been dragged through three courts by discharged counsel of the Castlemans, in violation of a court approved stipulation, without authority from his prior clients, in an action which is without prospect of any possible constructive result (unless further fees for Reich are the object sought).[3]

As the sole Respondent, therefore, Radio recognizes its obligation to place before this Honorable Court the facts, in order that further waste and expense may be prevented.

3. Institution of Stockholders' Actions by Castlemans in New York, California, and Nevada.

The Castlemans, directly represented at all relevant times only by Louis Kipnis, Esq. (herein "Kipnis") and Leo Mittleman, Esq., New York attorneys, filed a series of substantially identical stockholders' actions involving RKO. After formal demand in October, 1952 (R. 27-28), they first commenced two actions in New York (R. 100, 136-7). Hughes, not a resident of New York, could not be served and did not appear (R. 153, 319).[4]

On December 13, 1952, Kipnis retained Reich as his local co-counsel to institute the instant "stand-by" derivative action for the Castlemans in California (R. 153-4; 319-

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[2] Affidavit dated October 20, 1955 filed in the United States Court of Appeals.

[3] Reich has settled his fee claims against the Castlemans for an undisclosed amount. VARIETY, Jan. 13, 1956, p. 13. In his Petition, Reich does not bring forward the question of fees, but neither does he mention the settlement with the Castlemans or renounce his prior efforts to impose fees on Radio.

[4] Sidney Schwartz, another stockholder, filed a similar action in New York in November, 1952, which never progressed to the joinder of issue (R. 217).

20). This action was filed December 15, 1952, but no attempt was then made to serve any defendant.

The indispensable parties in the actions were Hughes and RKO. Neither was ever brought within the jurisdiction of the California court. No effort was made to serve RKO, and purported service on Hughes was quashed by the Court (R. 40, 131).

Shortly after the institution of the California action, Kipnis met with Hughes' attorney and Floyd Odlum, a large stockholder in RKO (R. 154-5; 320-1). At this conference Kipnis learned that Hughes was a resident of Nevada (R. 320), and "Hughes' representative stated that plaintiffs were free to pursue any policy or course they desired but if they instituted suit in Las Vegas, Nevada, where Hughes resides and is domiciled, he would appear and answer" (R. 224).

On December 23, 1952, the Castlemans sued in Nevada (R. 184). The Nevada complaint was substantially identical with that in the California action except that the Hughes Tool Company and all other directors of RKO were named as defendants in addition to Hughes (R. 187, 217). Reich concedes this (R. 137).

All defendants answered in the Nevada action, which thus came to issue as the only case in which all indispensable parties had been (or, in all likelihood, ever could be) brought before the court (R. 239-240). Pretrial discovery and preparation for trial proceeded (R. 224).

Meanwhile, the California action was quiescent until March 4, 1953, when Reich filed an amended complaint and Radio was served (R. 138). Kipnis and Mittleman appear as co-counsel on this complaint (R. 26), as they had on the original complaint which is not printed in the Record. Reich attempted to serve Hughes by having a copy of the summons and complaint left with the desk clerk at the Beverly Hills Hotel in Los Angeles (R. 138). Reich and

Kipnis differ as to whether Reich was authorized to attempt service in what both considered a "stand-by" action (R. 142-3). Certainly thereafter Kipnis and Reich were continuously at odds. Without detailing their struggle (R. 140-7), we note that on May 7, 1953, Kipnis discharged Reich and asked that he consent to a substitution of counsel (R. 157).[5]

On May 22, 1953, Reich signed a stipulation, approved by the Court, staying all proceedings in the California action until the determination of Radio's motion seeking (under Calif. Corp. Code, § 834) security for its costs (R. 37-9). The security motion was never determined. Radio therefore never answered the complaint in California.

Every step taken by Reich as against Radio after May 25, 1953, either below or here, violated the Court's order and this stipulation.

4. First Dismissal of the California Action and Vacation of Order.

On June 8, 1953, the trial court quashed Reich's purported service on Hughes and dismissed the action (R. 40-2). Hughes' counsel immediately advised Kipnis of the Court's order (R. 65). The dismissal was vacated on October 5, 1953, but the order quashing the purported service on Hughes was sustained (R. 71-2; 131-3).[6]

No further effort ever was made to serve either RKO or Hughes in the California action.

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[5] Meantime, in April, 1953, another stockholder, Milton Friedman, had filed an action in the state court and a second action in the federal court, both in California (R. 218).

[6] Meantime, in August, 1953, two stockholders, Schiff and Sachs, had instituted a derivative action in New York alleging a cause of action embraced in the Nevada action (R. 218).

5. Periodic Continuances of California Action.

With neither Hughes nor RKO before it, and with a stay stipulated and ordered as to Radio, the California court periodically continued the action pending final disposition of the Nevada case (R. 118-121; 121-2; 122-3; 173-4; 181-3).

In exercising this discretion, the trial judge made a matter of record his knowledge of the ability and integrity of the judge before whom the Nevada action was at issue (e.g., R. 370). Reich never has questioned these views.

Though his course in search of fees resulted in Reich taking various inconsistent positions, the court's decision to continue the action pending the outcome in Nevada had his blessing on several occasions. See, for example, April, 1953 (R. 142); September, 1953 (R. 55); October, 1953 (R. 85); February, 1954 (R. 169).

6. Reich's Charges of "Collusion."

As time passed, with his differences with his employers growing more acute, Reich naturally became concerned about his fees. His request to be named as co-counsel in Nevada was rejected (R. 322), as apparently also was his request for a letter agreement to be filed with "the defendants in New York, Nevada and California" (R. 166). Recognizing that the decision in Nevada would be *res judicata* in California, Reich in October, 1953, some ten months after institution of the Nevada action, began recklessly to charge all defendants and his employer, plaintiffs' lead counsel, with "collusion in submitting the action to the Nevada court" (R. 95).

This charge was not asserted solely in California. Reich, corresponding directly with the judge, invited the Nevada court to investigate the circumstances under which the Castleman action had come to issue in Nevada (R. 99-105).

But Reich refused to appear when (on motion by Hughes) the Nevada court promptly heard the complaint (R. 116-18). In fact, Reich in all his subsequent reiterations of the charge of "collusion" never passed from the realm of insinuation and innuendo into an area of probative evidence or even legitimate inference. As the Court of Appeals found, "Reich argues that the Nevada action was collusive, but the record does not bear out his contention."

The Nevada Rules of Civil Procedure with respect to the disposition of class actions are identical to the federal rules.[7]

The Nevada court, in accordance with the duty imposed by Rule 23(c) of the Rules, remained cognizant of Reich's charge and ultimately disposed of it, on the merits based on the evidence, in its findings of fact following a hearing at which both the Castlemans and Novembers appeared by counsel (R. 223-5. See below for appearances).

7. Hughes' Offer.

On February 7, 1954, Hughes offered to buy all assets of RKO *including all claims involved in the pending stockholders' suits* for $23,489,478 (R. 195 et seq.). The net effect of this offer was to cut through the several pending controversies and to extinguish all stockholder suits (R. 195; 200-1).

Hughes' offer was initially approved by the RKO Board of Directors and then submitted to the RKO stockholders in

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[7] Paragraph (c) of Nevada's Rule 23 covering "Class Actions" reads, in so far as pertinent, as follows: "A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs . . ."

Derivative stockholder actions undeniably come within the purview of Rule 23(a)(1). See 3 Moore's Fed. Prac., § 23.08.

a proxy statement approved by the Securities and Exchange Commission (R. 220). At the stockholders' meeting called for the purpose, the sale was approved. Of the total 3,891,526 shares entitled to vote, 3,358,116 shares were voted in favor of the offer and 73,227 against. Excluding Hughes' shares, 2,022,769 were voted in favor of the offer (R. 188).

8. Validity of Sale of Assets, Including Claims, Sustained by Delaware Court.

Immediately after the Hughes' offer, suit was instituted by RKO stockholders in Delaware, the state of RKO's incorporation, to enjoin the sale of the assets.

The validity of the sale, the propriety of including therein the sale of any claims asserted in the stockholders' action, and the fairness of the offer were upheld, after a hotly contested trial, in the case of *Schiff* v. *RKO Pictures Corporation,* 104 Atl. 2d 267 (1954). In his brief in the Court of Appeals Reich concedes "that the Delaware action is *res judicata* on the issue as to whether the sale was fair and that the Appellees do not and cannot challenge that judgment" (Brief, pp. 19-20).

This, of course, is a concession that the very claims alleged in this action are now extinguished because they are validly vested in Hughes. It concedes mootness.

9. Validity of Sale of Assets Sustained by Nevada Court.

In February, 1954, Hughes moved to dismiss the Nevada action with prejudice in the event the stockholders of RKO accepted his offer (R. 200). Pursuant to order of the court, notice of hearing of this motion, *in form prescribed by the court itself,* together with a copy of the motion, was mailed on March 1, 1954, to each RKO stockholder, including the Castlemans and the Novembers (R. 188-9; 200-3; 214-15; 227-236).

On March 22, 1954, the Castlemans and other stockholders appeared in person or by counsel before the Nevada court and a full hearing on oral and documentary evidence ensued (R. 189-226).

The Novembers, petitioners, appeared by their Nevada attorneys at this hearing and were advised in open court that they were free fully to participate and to examine witnesses (R. 189).

On March 30, 1954, the Nevada court filed extensive findings of fact and conclusions of law, portions of which are printed in the present Record (R. 214-225). The Record omits the section of the findings which analyzed each of the charges made as a basis of claimed liability (R. 223).[8] Pursuant to Rule 23(c) the Nevada court approved the sale of RKO's assets to Hughes as a compromise and settlement of the stockholder actions (R. 226-8). On April 1, 1954, after consummation of the sale, the Nevada court dismissed the action with prejudice (R. 192-3; 231-2).

10. Application by Novembers to Intervene in California.

Over a month after Hughes' offer, and after they had received notice of and an invitation to participate in the Nevada hearing, the Novembers, through Reich, on March 11, 1954, asked leave to intervene in the California action (R. 177).

Thereafter, the Novembers appeared by their attorneys at the Nevada hearing (R. 189).

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[8] Having elected in printing the record to omit the findings which analyzed the charges made against Hughes (R. 223), Petitioners have no record basis for the statement in the Petition for Certiorari (Pet. p. 6) that the Nevada court made "findings of fact and conclusions of law wholly in favor of Hughes on the merits." As a matter of fact, this statement is inaccurate, but is only one of the many inaccuracies in the Petition.

11. Radio's Motion to Dismiss Below.

On April 7, 1954, Radio moved to dismiss the California action on the ground that the final judgments in Delaware and Nevada were *res judicata* and rendered the California proceeding moot (R. 184-6; 193-4). Perforce, they also rendered moot the belated November application to intervene.

On August 5, 1954, the trial court granted Radio's motion to dismiss upon two grounds: (a) consummation of the sale of all causes of action to the alleged principal wrongdoer, established as valid in the Delaware action, rendered the California action moot; and (b) the Nevada judgment, resting upon identical charges, was *res judicata* as to all issues tendered in the California complaint (R. 356-7; 360-1).

ARGUMENT

I

The Delaware Court, in application of the Delaware law to a Delaware corporation, having sustained the validity of the sale of RKO's assets there is no federal question involved.

Ultimately Petitioners must answer the question as to what they propose to litigate in the event that this court grants certiorari and reverses the unanimous decisions of all lower court judges.[9] They concede that the sale of assets, sustained by the Delaware Court, is not subject to

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[9] We note in passing "the wise rule of judicial administration under which this Court does not upset concurrent findings of two lower courts in the ascertainment of facts and the relevant inferences to be drawn from them." Justice Frankfurter, dissent, *Securities and Exchange Com'n* v. *W. J. Howey Co.*, 328 U. S. at 302 (1946). Here three lower courts have rejected Reich's charges.

collateral attack in California. In *Schiff* v. *RKO Pictures Corp.*, 104 Atl. 2d 267-280 (1954), the Chancellor recognized that the effect of the sale would be to put an end to further litigation of the various stockholders' actions, which were then pending in no less than six proceedings in New York, California, and Nevada.

Manifestly, the legality of the sale of such contingent assets is a matter of state law. The Chancellor specifically sustained the validity of their sale (See 104 Atl. 2d at p. 280). The determination by the Delaware court of the Delaware law with respect to a Delaware corporation is binding not only upon the federal judiciary but also upon Petitioners.

Do Petitioners seriously propose that this Court should enter into an academic study of the correctness of the Delaware court's exposition of the Delaware law as applicable to a Delaware corporation on an issue which they admit to be foreclosed by the doctrine of *res judicata*? Do they seriously propose that, after such an academic exercise, the judgment below should be reversed so that they may attempt to prosecute a claim against the very individual who is the sole owner of such claim and who would be the sole beneficiary and recipient of any recovery against himself (except as such "recovery" might be mulcted for a fee for Reich)?

II

Each "petitioner" and each RKO stockholder is bound by the Nevada judgment.

As an individual, Reich obviously has no standing. In the most charitable light, Reich is a mere volunteer without even a shadow of justiciable interest.

The Castlemans, having been plaintiffs in the Nevada suit, are estopped from attacking the Nevada judgment

collaterally. They participated in all proceedings leading to that decree; accepted its benefits; did not appeal; and are bound. Reich as erstwhile California counsel to the Castlemans stands in privity with them and is also estopped from attacking the Nevada judgment. 49 C. J. S., Judgments, § 434-b; 1 Freeman on Judgments (5th Ed., 1925), §§ 305, 317.

The Novembers by their Nevada counsel appeared at and were free to participate in the hearing in Nevada which resulted in that Court's final judgment of April 1, 1954 (R. 236). Since they did not appeal the judgment, as was their right after court approval of the compromise and settlement (see, e.g., *Masterson* v. *Pergament*, 203 F. 2d 315 [6th Cir., 1953]; *Cohen* v. *Young*, 127 F. 2d 721 [6th Cir., 1942]), they are foreclosed from collateral attack.

Where a stockholder's derivative action, after due notice to all stockholders pursuant to Rule 23(c), terminates in a final judgment based upon judicial examination and approval of a settlement of the controversy, can a dissatisfied stockholder who appeared through counsel at the hearing avoid the normal *res judicata* operation of such judgment by a collateral attack in a foreign jurisdiction based upon a conclusory claim of "collusion"?

Petitioners' failure to find any authority for the affirmative is not surprising. It results from their failure to comprehend the rationale behind Rule 23(c)'s requirement of court approval after notice to all stockholders. This Rule not only required the Nevada Court to consider the bona fides of the action and of its compromise, but also imposed upon each stockholder, including the Novembers and their alter ego, Reich, the obligation of coming forward in the Nevada Court with any claim of vitiating collusion or being forever barred from contesting that issue elsewhere.

> *Piccard* v. *Sperry Corp.*, 36 F. Supp. 106 (S. D. N. Y., 1941), aff'd. 120 F. 2d 328 (2nd Cir., 1941);
> *Cohen* v. *Young*, 127 F. 2d 721 (6th Cir., 1942);
> *Upson* v. *Otis*, 155 F. 2d 606 (2nd Cir., 1946).

To protect the corporation and thereby all the stockholders, the court was charged with, and conscientiously discharged, the task of deciding whether any collusion existed.

Winkelman v. *General Motors Corporation,* 48 F. Supp. 490 (S. D. N. Y., 1942);
Pergament v. *Frazer,* 93 F. Supp. 13 (E. D., Mich., 1950), aff'd. 203 F. 2d 315 (6th Cir., 1953), cert. den. 346 U. S. 832 (1953);
Pottish v. *Divak,* 71 F. Supp. 737 (S. D. N. Y., 1947).

Conclusive authority against Petitioners' argument lies in the fact that Rule 23(c) accords each stockholder the following rights: he may offer evidence in support of, or in opposition to, the proposed dismissal and, without formal intervention, may appeal directly from the trial court's eventual approval or non-approval. *Cohen* v. *Young,* 127 F. 2d 721 (6th Cir., 1942); *Masterson* v. *Pergament,* 203 F. 2d 315 (6th Cir., 1953).

Here the Nevada Court, in considering the evidence and in finding that the action and proceedings before it were adversary and non-collusive, conscientiously fulfilled the duty imposed upon it by Rule 23(c). Petitioners, on the other hand, after failing to present evidence, if any they had, in Nevada, and failing to appeal from the Nevada judgment, cannot raise the collusion issue collaterally.

The recent litigation in the Sixth and Second Circuits affecting the Kaiser-Frazer Corporation is completely dispositive of Petitioners' contention.

See

Pergament v. *Frazer, et al.,* 93 F. Supp. 13 (E. D., Mich., 1950), aff'd. 203 F. 2d 315 (6th Cir., 1953), cert. den. 346 U. S. 832 (1953); and
Stella v. *Kaiser, et al.,* 218 F. 2d 64 (2nd Cir., 1954).

In the *Kaiser-Frazer* situation six stockholders' actions were pending in various courts in different states—three in Federal and three in State courts. Defendants chose to negotiate a settlement with the attorneys representing Pergament in the Eastern District of Michigan. Eventually, and without consulting counsel for the plaintiffs in the other actions, a settlement of the entire controversy was reached. The settlement was then placed before the Michigan Court for its approval.

After extended hearings and close analysis, the Court approved the settlement and dismissed the action with prejudice. In describing the effect of this judgment, it stated, 93 F. Supp. at p. 17:

> "On or about September 21, or 25, 1949, Pergament and London, plaintiffs in this action, began conferences with defendants through their attorneys, having as their objective settlement of this and all derivative suits begun by stockholders. A settlement agreement was arrived at October 25, 1949.
>
> "That proposed compromise is now before this court and if approved will serve to dismiss not only the Pergament-London action but will eliminate all other stockholders' derivative suits heretofore started."

On appeal the District Court's approval was affirmed. *Masterson* v. *Pergament*, 203 F. 2d 315 (6th Cir., 1953), cert. den., 346 U. S. 832 (1953).

The matter, however, was not permitted to rest. Another stockholder, Stella, sought to renew and press an action which he had instituted in the Southern District of New York (see 82 F. Supp. 301) *prior* to the institution of the *Pergament* action in Michigan. There is a precise parallel of this sequence to the oft-labored fact that the Castleman-California action preceded the Castleman-Nevada action by eight days. Stella was met with the claim that the Pergament settlement and judgment of dismissal were *res judicata* to which he replied, *inter alia*, that the Michigan

judgment was so fatally tinged with fraud as to permit a collateral attack to be maintained in New York.

Summary judgment granted the defendants was affirmed. *Stella* v. *Kaiser*, 218 F. 2d 64 (2nd Cir., 1954).

The case is precisely analogous. Reich has no standing to assert—on behalf of any RKO stockholder, whether actually present before Judge McNamee on March 22, 1954 or not—that a collateral attack can be levied in the California courts now against the Nevada Court's judgment of dismissal with prejudice entered after notice to all RKO stockholders.

CONCLUSION

The petition for certiorari is so clearly without merit as to verge upon the frivolous. The petition accordingly should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1955

No. 632

ELI B. CASTLEMAN, MARION V. CASTLEMAN, LOUIS FEUERMAN, JULIUS NOVEMBER, ELEANOR NOVEMBER, and BERNARD REICH,

Petitioners,

vs.

HOWARD R. HUGHES, RKO RADIO PICTURES, INC., ELI B. CASTLEMAN, MARION V. CASTLEMAN and LOUIS FEUERMAN,

Respondents.

Petitioners' Reply on Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Statement.

The *Per Curiam* Opinion of the Court of Appeals filed November 3, 1955, is now reported in 227 F. 2d 533.

Schiff v. RKO Pictures Corporation, 104 A. 2d 267, cited in said Opinion, is not officially reported.

We submit that a fair summary of the briefs in opposition stripped of personal abuse is: that the Nevada judgment is *res judicata;* that no collusion has been shown; that the interveners have no standing; that the attorney of record Reich is without a party to represent and otherwise has no standing; and that the sale to Hughes (with which the Delaware court refused to interfere) rendered the action below moot.

On the other hand, we submit: that the Nevada judgment is challengeable for collusion; that the issue of collusion has never been tried in any adversary proceeding; that the interveners have not been deprived of standing by inaction on the part of the trial court; that the attorney of record in a class action has both the duty and right to proceed in favor of the entire class and especially for interveners; and that the sale to Hughes did not render the action moot.

In particular we would reply to Respondents as follows:

1. Their anger directed at Reich, we submit, stems from his refusal to renounce his responsibility to the trial court as California attorney of record, his causing to be set aside the first dismissal made and entered by them without his knowledge or consent, and his persistent challenge to the validity of the Nevada judgment obtained by them in a non-adversary proceeding.

As to their attack on Reich's alleged fee motivation based on matters *dehors* the Record, we have reproduced in an appendix hereto a record colloquy between the District Court and counsel relative to that issue [R. 371-373]. Also, we would respectfully draw the Court's attention to the fact that the issue of fees is not raised by the Petition. Our aim was to present only those issues which were of major concern to the integrity of the Federal judicial process.

2. No brief for the respondent Hughes has been filed, on the theory suggested by respondent RKO that service of process on Hughes having been quashed below, he is not before the Court. This theory loses sight of the principle that an appeal from a final judgment brings up

for review intermediate orders. (*Western Union v. U. S. & M. T. Co.*, 221 Fed. 445, 551 (C. C. A. 8, 1915).)

3. Respondents have restated the facts based on *their* affidavits, ignoring that part of the record which supports petitioners, and ignoring the fundamental fact that there was no trial and no findings in the trial court on the fact issues—only a refusal on the part of the court to hear and determine.

4. Respondents sought below and now seek affirmance predicated on the *discretion* of the trial court, losing sight of the principle that where the trial court refuses a trial, abdicates its jurisdiction, and fails to *exercise its discretion*, the judgment may not stand. (Please see Pet. p. 9, *et seq.*; also case decided by different panel of same court below, *Romero v. Weakley*, 226 F. 2d 399, 401 (1955).)

This refusal to hear and determine on the part of the trial court, it is respectfully submitted, of itself answers respondents' allegations that the Novembers appeared at the Nevada hearing on the motion to dismiss for mootness (actually, they did not [R. 258, 259], but the issue was never tried); that their petition to intervene was untimely (actually, it was made months before the motion to dismiss, although it could have been made after judgment, *Pellegrino v. Nesbit*, 203 F. 2d 463, 465 (9 Cir.), but the issue was never tried); that Reich was discharged (actually, there was only a purported discharge, the motion to discharge him was never ruled on [R. 119, 121]); that Reich's charges of collusion were not proved (actually, there was no ruling on the issue of collusion in the trial court although a trial was expressly requested [R. 243, 248, 249]); and that proper notice of the eventual character of the Nevada hearing was given stockholders (actually, there was no ruling on this issue although expressly raised [R. 243, 244, 255, 256]).

5. Respondents' reference to a stipulation made by Reich but fraudulently induced by respondents [R. 165-166], staying the proceedings pending outcome of a security motion is without substantive meaning in view of the fact that the stipulation was abandoned and failed when the action was dismissed the first time without the knowledge or consent of plaintiffs' attorney of record, and in any event in the face of the fraud and collusion charges. Certainly no stay can prevent proceedings designed to expose fraud and collusion.

6. At the time the action was dismissed the first time without Reich's knowledge or consent, plaintiffs' New York attorneys were on the Complaint by courtesy only. They did not comply with Local Rule 1(d)* [R. 44]. Nor did they ever comply; all that transpired was that a third attorney, not himself attorney of record for plaintiffs, after the charges of collusion were made, moved the admission of the New York attorneys for the purpose of the action only [R. 120, 182].

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*Local Rule 1(d) Non-Resident Attorneys:

"Only a member of the bar of this court may enter appearances for a party, sign stipulations or receive payment or enter satisfaction of judgment, decree or order. However any member in good standing of the Bar of any United States court, or of the highest court of any State or of any Territory or Insular possession of the United States, who has been retained to appear in this court, and who is not a resident of this district, or does not maintain an office in this district for the practice of law, may be permitted after application, without previous notice, to appear, and participate in a particular case. Such applicant shall designate, in his application so to appear, a member of the bar of this court who maintains an office in this district for the practice of law, with whom the court and opposing counsel may readily communicate regarding the conduct of the case. He shall also file with such application the address, telephone number and written consent of such designee. Such permission to appear being a limited one, no certificate of admission shall be issued by the Clerk."

7. Plaintiffs-Respondents, by taking words out of context, by confusing the time element, and by misunderstanding courtesy to the trial court, attempt to blame the trial court's inaction on Reich, but the full text belies their attempt [R. 44-55, 90-91, 135-172]. The real point is that when the motions were pressed, they were not determined [R. 351-352, 355].

8. Reich's standing in this case was challenged in the Courts below. The District Court refused to rule; the Court of Appeals denied a motion to dismiss the appeal and a motion to "re-settle" its order of denial. Moreover, Reich's right to proceed was not denied, but was assumed in that Court's decision (App. A to Pet.).

9. Mr. Justice Cardozo's statement in *Landis v. North American Company,* quoted by Plaintiffs-Respondents, that the trial court has power to stay, does not support the trial court's refusal to hear and determine—because had the trial court acted to stay, that act could have been reviewed. In *Schwab v. Coleman,* 145 F. 2d 672, 677, 678 (C. C. A. 4, 1944), the court stated:

> "If the judge had passed upon the petitions of applicants and denied them naturalization, they could have appealed to us and asked a reversal of his decision, which could then have been reviewed by us in the light of the law and the evidence. * * * A continuance may, of course, be granted in naturalization cases as well as in others, and whether or not such continuance shall be granted is ordinarily a matter resting in the court's discretion; but the discretion thus vested in the court is a sound, not an arbitrary, discretion; and it may not be exercised in such way as to result in the denial of the right of review to which a party is entitled.
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> * * * * * * * *

". . . Whether petitioners were entitled to naturalization or not, they were, at least, entitled to have their petitions passed upon so that they might appeal from an adverse decision to this court; and the continuance over their protest did not lie within the limits of judicial discretion as to granting continuances but amounted to a refusal to exercise power which petitioners had a right to have exercised. 35 Am. Jur., pp. 25, 26."

Finally, no restatement of the facts by respondents can whittle away the following undeniable truths:

1. The California action below was filed before the Nevada or Delaware actions.

2. The Nevada forum was selected by Respondents.

3. The California action was dismissed the first time at the instance of Respondents without the knowledge or consent of plaintiffs' California attorney of record.

4. The California Court refused to hear and determine any proceedings in the California action prior to the adjudication in Nevada and Delaware.

5. The Nevada Court refused to permit intervention by the Petitioners November.

6. The California Court failed to act on the Novembers' petition to intervene.

7. The Nevada Court tried the case and/or approved a compromise of it on a motion to dismiss grounded on mootness (allegedly resulting from the sale of all assets to Hughes). The stockholders had notice only of that motion and not of any trial or hearing to approve a compromise.

8. The California Court dismissed the second time without hearing the charges of fraud and collusion.

ARGUMENT.

I.

The Nevada State Judgment, Being Subject to Attack for Collusion, Is Not Res Judicata Until the Issue Is Tried in the Court Where It Is Legally and in Good Faith Raised.

The heading above was treated at page 17, *et seq.*, of the Petition. We would add the following citation:

> *Cuthill v. Ortman-Miller Mach. Co.*, 216 F. 2d 336, 338 (C. A. 7, 1954).

Had the Court below tried the issue and found against the allegations, then the cases cited by Respondents would have had some applicability.

In *Masterson v. Pergament*, 203 F. 2d 315, 330, there was no opposition to the settlement, no proposed interveners, and no contention that the stockholders were not adequately represented.

In *Cohen v. Young*, 127 F. 2d 721, 724-725, there was a finding below of adequate representation. Nevertheless, on an appeal by a proposed intervener who had been denied intervention below, the judgment was reversed over the opposition, as herein, of the plaintiffs.

In *Winkelman v. General Motors Corporation*, 48 Fed. Supp. 490, it was held that the trial court's role is to ferret out fraud and collusion. This is the role which the District Court should have assumed when the issue was raised before it.

In *Pergament v. Frazer,* 93 Fed. Supp. 13, 16, the action tried was the action first filed. All objecting stockholders who appeared in other courts appeared here. The Court tried the issues of collusion and inadequate representation.

In *Stella v. Kaiser,* 218 F. 2d 64, one of the out-of-state stockholders who had appeared in *Pergament v. Frazer, supra,* attempted to *retry* the issue of collusion in his own state.

In the instant case, the issues of collusion and inadequate representation were "tried" in Nevada as between the very parties charged with collusion and fraud. [R. 114, 245.] Respondents' argument here amounts to this: "We whose very actions are challenged, are not subject to attack in California because between ourselves we have resolved the issues in Nevada." Unlike in the *Stella* case, *supra,* no intervening stockholder here was permitted to *try* the issue of collusion in Nevada; and therefore again unlike *Stella,* no intervening stockholder, including the Novembers, has attempted to *retry* the issue of collusion in the Courts below.

Moreover, the Novembers were denied intervention in Nevada. They had the right to intervene here. (Please see Pet. p. 17 *et seq.;* also *Pellegrino v. Nesbit,* 203 F. 2d 463 (C. A. 9, 1953); *Cuthill v. Ortman-Miller Machine Company,* 216 F. 2d 336 (C. A. 7, 1954).)

In the *Cuthill* case, *supra,* the Court stated:

> "The facts pleaded were sufficient to justify appellant's fears; they brought him within the doctrine

enunciated by the Supreme Court in United States v. Throckmorton, 98 U. S. 61, at page 65, 25 L. Ed. 93 * * *. See also U. S. v. Kusche, D. C. 56 F. Supp. 201, at page 216. Here appellant pleaded with particularity and great detail facts tending to show that there had been *no adversary trial of the issue in the case; that this situation emanated from the collusion of the original parties;* that appellant's interests were adversely affected and *that no adequate representation of his and the corporate interests had been supplied. Inasmuch as Rule 60(b) endows the court with power to vacate any fraudulent judgment, plaintiff was entitled to be heard upon his averments.* Obviously the District Court has inherent power to investigate such averments of fraud. Hazel-Atlas Co. v. Hartford Empire Co., 322 U. S. 238, 64 S. Ct. 997, 88 L. Ed. 1250; Universal Oil Products Co. v. Root Refining Co., 328 U. S. 575, 66 S. Ct. 1176, 90 L. Ed. 1447." (Emphasis added.)

II.

No Stockholder (Except the Castlemans and Feuerman Personally) or Attorney (Except Their New York Attorneys) Is Estopped From Challenging the Nevada State Judgment for Collusion.

This incontrovertible rule is the key to much of the error of the reply briefs.

The Novembers were denied intervention in Nevada; their application below was not heard and determined. The Novembers were never permitted to litigate the issue of collusion in Nevada or California.

Please note that the Courts below did not rule that the Novembers were estopped to intervene in this case by reason of the denial in Nevada or because their application to intervene was untimely. Moreover, the action

below was a representative action. Assuming, as we must, the truth of the allegations of collusion in the Nevada action, the question, no matter how raised, must be considered by the forum where the action was commenced prior to the challenged action and where the proceeding is adversary.

Cf. Cuthill v. Ortman-Miller Machine Company, 216 F. 2d 336, 338, 339 (C. A. 7, 1954).

III.

The Nevada Judgment Did Not Meet the Requirements of Due Process.

Because the District Court refused to try the issue, the ultimate correctness of the above heading is really not before this Court. For example, Respondents' claim that the Novembers had notice of the Nevada "compromise" because they "appeared" by an attorney. This again flies in the face of the rule that the Novembers' allegations to the contrary must be assumed true. [R. 257-259.]

Moreover, without directly challenging the Petition, page 5, demonstrating that the Nevada court converted a motion to dismiss for mootness, of which the stockholders had notice, to a 23(c) hearing, of which the stockholders had no notice [R. 200, 202, 255, 256], Respondents cite from their own evidence (in conflict with Petitioners') to support their side of the issue. *But issue it is, and it has not yet been resolved.*

IV.

Neither the Delaware Action nor the Sale to Respondent Hughes of All Assets Rendered the Action Herein Moot.

Petitioners' citation in their Petition to support the above heading remains unchallenged by Respondents. Moreover, respondents cite no authority other than the Delaware case itself.

If quotation by respondents of our brief in the Court of Appeals is proper, we would prefer the full quotation as follows:

> "We concede that the Delaware action is *res judicata* on the issue as to whether the sale was fair and that the appellants here do not and cannot challenge that judgment.
>
> "However, this is no concession that the Delaware judgment renders moot the action herein. The question still remains one of law, to wit: may an officer and stockholder sued for fraud and mismanagement by other stockholders defeat jurisdiction by buying up all of the assets, purportedly including stockholder derivative causes of action.
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> "The Delaware action cited in the District Court's memorandum, *Schiff v. RKO Pictures Corp.*, 104 A. 2d 267 (1954), never ruled on this question as it was not before it. Even if it had, it would have been *dicta* and not binding on a foreign court which must determine its own jurisdiction. Obviously, whether a first judgment is *res judicata* or otherwise binding on a second court is determinable not by the first court but by the second court.

> "Even the Nevada court did not hold that the Delaware court rendered the action in Nevada moot. Although the motion to dismiss before the Nevada court was grounded on mootness, it instead held a hearing (without notice on the issue) as to whether the Hughes' offer to buy was a fair and adequate compromise. The Nevada court decided this question for itself without reference to the Delaware judgment."

We submit that a stockholder action may not be disposed of on the basis of purchase by the person charged with the wrongdoing.

Conclusion.

The decisions below, if undisturbed, leave the posture of the litigation as follows: (a) no court in any adversary proceeding has even examined into, no less ruled on, the charges responsibly made under oath that the Nevada action was a fraud and a sham; (b) the Nevada court refused intervention to the petitioners November who could have supplied opposition [R. 244]; (c) without notice to the stockholders of anything but a motion to dismiss for mootness [R. 200, 202, 255], it approved the purported compromise [R. 215, 244]; (d) the Delaware court did not have before it that issue, only whether the sale to Hughes was fair; and (e) the California Court refused to hear or act.

The Court of Appeals, it is respectfully submitted, has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision.

"Hear the causes between your brethren." (Deut. 1:6.) This biblical admonition went unheeded below.

The Petition for a Writ should be granted.*

Dated: February, 1956.

Respectfully submitted,

JACK P. BLUME,
Attorney for Petitioners.

BERNARD REICH, and
MORRIS E. COHN,
Of Counsel.

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*This Court has summarily vacated judgments and remanded either to the Court of Appeals *en banc* for further consideration in view of the conflict of views between different panels (on the abdication issue) (*Romero v. Weakley*, 226 F. 2d 399), (and the intervention issue) (*Pellegrino v. Nesbit*, 203 F. 2d 463). Please see *United States ex rel. Robinson v. Johnston*, 316 U. S. 649 (1942); *Civil Aeronautics Board v. American Air Transport*, 344 U. S. 4, 5 (1952); *Western Pacific Railroad Case*, 345 U. S. 247, 260, n. 20 (1953); or to the trial court for trial of all issues on the merits (*Securities and Exchange Commission v. Otis & Co.*, 338 U. S. 843 (1949); *Ewing v. Gardiner*, 341 U. S. 321 (1951)).

APPENDIX.

Excerpts From Record 371-3.

"Mr. Reich: I will stipulate that my fees may be small. I will stipulate you don't have to fix fees at all.

The Court: You don't have to so stipulate.

Mr. Reich: Your Honor, it is important that my position be stated.

The Court: I think I understand your position. And I think if they want to fire you out of the case they should pay you for what services you have rendered. * * *. But I would dislike very much to be holding onto a case when the client wants to fire me.

Mr. Reich: Assume that you are practicing law instead of occupying the bench and assume—

The Court: If I had been practicing law this case wouldn't have been here.

Mr. Reich: Well, your Honor, if you had information that I have—assuming that you had certain information which led you to believe that the stockholders weren't being properly represented wouldn't you feel it was your duty to the court to apprise the court * * *.

* * * This action was dismissed, your Honor, without my knowledge. Certainly you would have felt the duty as a lawyer as I did to set the record straight * * *

The Court: I think you lawyers should get together in an arena of your own and fight it out and settle this case between the lawyers as to who is who in the case without intervention on my part. * * *

Mr. Reich: Well, your Honor, what would you do about it? What could I do about it? You advise me and I will do it. I just want to do what is right. You tell me what to do and I will do it.

The Court: I am not telling you what to do."